

January 10, 2023

By ECF

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939
www.ca9.uscourts.gov

Re: Notice of Supplemental Authority in *Migrant Clinicians Network v. U.S. Environmental Protection Agency*, No. 21-70719

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j), Petitioners advise the Court of two recent decisions: *Center for Food Safety v. Regan* (CFS *v. Regan*), No. 19-72109, 2022 WL 17826872 (9th Cir. Dec. 21, 2022), and *Center for Biological Diversity v. EPA* (CBD *v. EPA*), No. 15-1054, 2022 WL 17878791 (D.C. Cir. Dec. 23, 2022). Although neither decision vacated the unlawful pesticide registrations at issue, the reasoning of both decisions supports Petitioners' argument that vacatur is warranted here. *See* ECF No. 54, at 67-75.

In *CFS v. Regan*, this Court underscored the seriousness of EPA's "habit" of violating the ESA, explaining that it "undermines" the structure of government when EPA "deliberately ignores Congress's legislative command." *CFS v. Regan*, 2022 WL 17826872, at *8. The D.C. Circuit likewise decried "EPA's broken system of ESA (non)review," *CBD v. EPA*, 2022 WL 17878791, at *15, observing that the Agency's "ongoing, widespread failure to comply with the ESA when it registers pesticides . . . plainly counsels against remand without vacatur," *id.* at *12.

Vacatur is plainly appropriate here. Unlike in *CBD v. EPA*, the parties have not reached a negotiated settlement to leave the registration in place. *See* 2022 WL 17878791, at *9-11, *13. And in contrast to *CFS v. Regan*, this is not a case in which the challenged pesticide is less toxic than the market alternatives, such that vacatur would risk greater environmental harm. *See* 2022 WL 17826872, at *12-13, *16 (“Remand without vacatur here maintains ‘the enhanced protection of the environmental values covered by [the registration]’ because sulfoxaflor has a more favorable toxicological profile compared to alternatives.”); *see also* *CBD v. EPA*, 2022 WL 17878791, at *12 (explaining that the court declined to vacate an earlier pesticide registration in *CBD v. EPA*, 861 F.3d 174 (D.C. Cir. 2017), notwithstanding EPA’s ESA violation, because the pesticide “was generally less toxic than existing alternatives”). Rather, EPA once again violated the ESA but failed to show that vacatur presents a lesser risk of environmental harm than leaving the registration in place.

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Respectfully submitted,

s/ Hannah Connor

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